

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RANDY BRADY,

Defendant-Appellant.

UNPUBLISHED

March 22, 2007

No. 266675

Kent Circuit Court

LC No. 04-004841-FH

Before: Hoekstra, P.J., and Markey and Wilder, JJ.

PER CURIAM.

Defendant was convicted of assault with intent to rob while unarmed, MCL 750.88, under an aiding and abetting theory, and reckless driving, MCL 257.626. He was sentenced as a fourth habitual offender, MCL 769.12, to concurrent prison terms of three to twenty years and 90 days for those respective convictions. Defendant's sentences were to be served consecutively to his sentence from which he was on parole at the time of the offenses at issue here. Defendant appeals as of right. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant, his son, and his son's friend stole a mini-bike from a teenaged boy. Defendant was driving his car when the three came upon two boys riding mini-bikes. Defendant pursued the boys in his car until one of the boys stopped. Defendant got out of the car and covered his license plate with a t-shirt in an apparent attempt to keep the vehicle from being identified and connected to him. Defendant's son and the friend also got out of the car. The friend pushed the boy off his mini-bike and rode it away. Defendant's son hit the boy and demanded his helmet. The boy ran for help, and defendant and his son were arrested shortly thereafter.

Defendant first claims the verdict was against the great weight of the evidence and the trial court erred because it found him guilty for failing to stop his son and his son's friend from committing the robbery. Defendant asserts the trial court imposed criminal liability even though he did not actually participate in the crime. We disagree.

We review findings of fact for clear error. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). A finding is clearly erroneous if it leaves this Court with a definite and firm conviction that a mistake was made. *People v Lyons (On Remand)*, 203 Mich App 465, 468; 513 NW2d 170 (1994).

A new trial may be granted on some or all of the issues if a verdict is against the great weight of the evidence. MCR 2.611(A)(1)(e). “The test to determine whether a verdict is against the great weight of the evidence is whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand.” *People v Musser*, 259 Mich App 215, 218-219; 673 NW2d 800 (2003).

“The general rule is that, to convict a defendant of aiding and abetting a crime, a prosecutor must establish that ‘(1) the crime charged was committed by the defendant or some other person; (2) the defendant performed acts or gave encouragement that assisted the commission of the crime; and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time that (the defendant) gave aid and encouragement.’” *People v Moore*, 470 Mich 56, 67-68; 679 NW2d 41 (2004), quoting *People v Carines*, 460 Mich 750, 768; 597 NW2d 130 (1999). “In determining whether a defendant assisted in the commission of the crime, the amount of advice, aid or encouragement is not material if it had the effect of inducing the commission of the crime.” *Moore, supra* at 71, citing *People v Smock*, 399 Mich 282, 285; 249 NW2d 59 (1976). Mere presence, even with knowledge that an offense is about to be committed, is not enough to make one an aider or abettor. *People v Burrel*, 253 Mich 321, 323; 235 NW 170 (1931).

Here, the trial court explicitly determined that defendant aided or abetted the robbery. The trial court accepted as true the testimony of the victims in the case, finding they had no reason to lie about what they saw. Both victims identified defendant as the driver of the car. The car, with defendant at the wheel, was an integral part of the robbery. Defendant pursued the victim in his car and forced the victim to stop his mini-bike on the side of the road, thus enabling the other two perpetrators to steal the mini-bike. Further, defendant tried to conceal his involvement in the crime by putting a t-shirt over the license plate of his car.

When reviewing the trial court’s findings of fact, this Court gives deference to the trial court’s superior position to observe the credibility of the witnesses. *People v Sexton (After Remand)*, 461 Mich 746, 752; 609 NW2d 822 (2000). The trial court rejected the testimony of defendant’s family and the codefendant about who was driving the car in favor of testimony from the victims. We defer to the trial court’s assessment of witness credibility. This case is not one where the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. *Musser, supra*.

Defendant next argues *in pro per*¹ that he was denied due process and equal protection because he received no credit, against his new sentence, for the 538 days served in jail prior to his sentencing for the offenses at issue here, where he was not held on a parole detainer, but was instead unable to post bond. We disagree.

¹ This Court granted defendant’s motion for extension of time to file a supplemental *in pro per* brief. *People v Brady*, unpublished order of the Court of Appeals, issued January 4, 2007 (docket no. 266675).

This Court reviews questions of statutory interpretation de novo. *People v Seiders*, 262 Mich App 702, 705; 686 NW2d 821 (2004) (*Seiders II*). Constitutional claims (questions of constitutional law) are also reviewed de novo. *People v Grant*, 470 Mich. 477, 484-485; 684 NW2d 686 (2004).

MCL 769.11b provides:

Whenever any person is hereafter convicted of any crime within this state and has served any time in jail prior to sentencing because of being denied or unable to furnish bond for the offense of which he is convicted, the trial court in imposing sentence shall specifically grant credit against the sentence for such time served in jail prior to sentencing.

However, MCL 768.7a(2) provides:

If a person is convicted and sentenced to a term of imprisonment for a felony committed while the person was on parole from a sentence for a previous offense, *the term of imprisonment imposed for the later offense shall begin to run at the expiration of the remaining portion of the term of imprisonment imposed for the previous offense.* [Emphasis added.]

Thus, plaintiff's sentences for the offenses at issue here will begin to run after the expiration of the remainder of the sentence from which plaintiff was paroled at the time of the instant offenses.

MCL 791.238 provides, in relevant part:

(1) Each prisoner on parole shall remain in the legal custody and under the control of the department. The deputy director of the bureau of field services, upon a showing of probable violation of parole, may issue a warrant for the return of any paroled prisoner. Pending a hearing upon any charge of parole violation, the prisoner shall remain incarcerated.

(2) A prisoner violating the provisions of his or her parole and for whose return a warrant has been issued by the deputy director of the bureau of field services is treated as an escaped prisoner and is liable, when arrested, to serve out the unexpired portion of his or her maximum imprisonment. *The time from the date of the declared violation to the date of the prisoner's availability for return to an institution shall not be counted as time served.* The warrant of the deputy director of the bureau of field services is a sufficient warrant authorizing all officers named in the warrant to detain the paroled prisoner in any jail of the state until his or her return to the state penal institution.

* * *

(6) A parole shall be construed as a permit to the prisoner to leave the prison, and not as a release. While at large, the paroled prisoner shall be considered to be serving out the sentence imposed by the court and, if he or she is

eligible for good time, shall be entitled to good time the same as if confined in a state correctional facility. [Emphasis added.]

“Thus, time spent on parole is counted toward service of the sentence. The statute does, however, create a period of ‘dead time,’ during which a parole violator is *not* considered to be serving his sentence following a violation of parole.” *People v Watts*, 186 Mich App 686; 464 NW2d 715 (1990).² “Therefore, after an arrest, the parolee again begins serving his sentence for the prior conviction. This is true even if the parolee is incarcerated in a county jail awaiting trial for a new charge.” *Id.* at 689. In other words, a “parole detainee who is convicted of a new criminal offense is entitled, under MCL 791.238(2), to credit for time served in jail as a parole detainee, *but that credit may only be applied to the sentence for which the parole was granted.*” *Seiders II*, *supra* at 705 (emphasis added).

In *Seiders II*, this Court reaffirmed these principles (and this interpretation of the statutes quoted above), and held that where a defendant who is on parole, even from a sentence for a conviction in a foreign jurisdiction, if he is arrested in Michigan for a new criminal offense, and is held on parole detainer while awaiting sentencing for the new offense, he is not entitled to receive credit for time served against the sentence for the new offense; rather, that credit is applied against the sentence from which the defendant was on parole. *Seiders II*, *supra* at 707-708.

“[A] defendant who has received a consecutive sentence is not entitled to credit against the subsequent sentence for time served. Rather, any credit for time served should be applied against the first sentence.” *Watts*, *supra* at 687 (citation and footnote omitted). In other words, “because the second sentence is not to begin until the expiration of the first sentence, which had not expired before the sentencing for the second offense, *defendant is not entitled to credit for time served against his second sentence.*” *Id.* at 691 (emphasis added; footnote omitted).

Watts and *Seiders II* are controlling. Defendant’s statutory arguments have already been rejected by this Court. Defendant’s time in jail after arrest for the instant offenses may not be credited against his sentences for the instant offenses, because defendant’s sentence for his prior offense has not yet expired. *Watts*, *supra* at 687. “[D]efendant was continuing to serve his sentence for the prior offense while incarcerated awaiting trial for the instant offense. Therefore, defendant will receive credit for the time spent in the county jail. *The credit, however, will be against his prior sentence, not the current sentence.*” *Watts*, *supra* at 689 (emphasis added). Because defendant’s time in jail awaiting trial on the instant charges may be credited against his sentence from which he was paroled at the time of the instant offenses, we reject defendant’s claim that he suffered “dead time.”

² “The term ‘dead time’ refers to time spent in confinement for which no day-to-day credit is given against any sentence.” *Commonwealth v Milton*, 427 Mass 18, 21; 690 NE2d 1232 (1998).

Defendant has failed to cite any authority holding that crediting the time spent in the county jail (awaiting trial and sentencing for the instant offenses) toward defendant's prior maximum sentence deprives him of liberty without due process of law, or deprives him of the equal protection of the law.³ Nor do we find any such authority. Therefore, we reject defendant's constitutional arguments, and hold that defendant is not entitled to resentencing on the convictions at issue here.

Affirmed.

/s/ Jane E. Markey
/s/ Kurtis T. Wilder

I concur in result only.

/s/ Joel P. Hoekstra

³ Defendant also argues that the failure to grant credit, against the sentences for the instant offenses, for time served awaiting trial and sentencing, violates his state and federal constitutional rights to be free from double jeopardy. This argument, however, is waived because it was not raised in defendant's statement of questions presented in his supplemental brief. MCR 7.212(C)(5); *People v Miller*, 238 Mich App 168, 172; 604 NW2d 781 (1999).